IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
CHAKA FATTAH, JR.	:	NO. 14-409

MEMORANDUM

Bartle, J. January 7, 2015

Before the court is the motion of defendant Chaka Fattah, Jr. ("Fattah") to dismiss Count Seventeen of the indictment for failure to state an offense.

Fattah has been indicted on twenty-three counts of fraud, theft, and tax-related offenses. In Count Seventeen the Government charges that on or about February 15, 2010 Fattah willfully filed a false federal income tax return for the 2009 tax year in violation of 26 U.S.C. § 7206(1). According to the indictment, Fattah submitted a Form 1040 in which he reported an adjusted gross income of $39,519, which did not include an additional $6,092 in taxable income that Fattah purportedly received.

Rule 7(c)(1) of the Federal Rules of Criminal Procedure provides that an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). Detailed allegations or technicalities are not required. United

States v. Resendiz-Ponce, 549 U.S. 102, 110 (2007). Our Court of Appeals has held that an indictment states an offense if it:

> (1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution.

United States v. Bergrin, 650 F.3d 257, 264 (3d Cir. 2011) (quoting United States v. Kemp, 500 F.3d 257, 280 (3d Cir. 2007)).

An indictment must do more than simply recite in general terms the essential elements of the offense. See id. Similarly, the specific facts alleged in the indictment may not fall beyond the relevant criminal statute. Id. at 264-65. However, "no greater specificity than the statutory language is required so long as there is sufficient factual orientation to permit the defendant to prepare his defense and to invoke double jeopardy in the event of a subsequent prosecution." Kemp, 500 F.3d at 280 (quoting United States v. Rankin, 870 F.2d 109, 112 (3d Cir. 1989)). We take as true all well-pleaded factual allegations set forth in the indictment. United States v. Besmajian, 910 F.2d 1153, 1154 (3d Cir. 1990).

Title 26 U.S.C. § 7206(1) makes it a crime to file a false income tax return. It states:

> Any person who... [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter... shall be guilty of a felony.

26 U.S.C. § 7206(1). The parties agree that, in order to convict under this statute, the Government must prove that the defendant made and subscribed to a personal tax return under penalties of perjury that was false as to a material matter and that the defendant subscribed to the return willfully and without the belief that the return was true and correct.

The indictment closely follows the statutory language. It charges in Count Seventeen that Fattah:

> [W]illfully made and subscribed a United States income tax return, Form 1040, for the calendar year 2009, which was verified by a written declaration that it was made under the penalty of perjury and filed with the Director, Internal Revenue Service Center, which defendant FATTAH did not believe to be true and correct as to every material matter, in that the return reported adjusted gross income of $39,519, when in fact, as FATTAH knew, he had received an additional taxable income of approximately $6,092.

The defendant argues that § 7206(1), a perjury statute, is not the appropriate section of the Internal Revenue Code to address the violation alleged here. According to Fattah, all of the

representations he made on his 2009 return were literally true. The Form 1040EZ that Fattah submitted only asks about wages, salaries, and tips.[1] However, Fattah maintains that the $6,092 alleged to have been omitted was business income for which there is no line on the Form 1040EZ for its inclusion. The Government does not challenge Fattah's statement in this regard. Fattah reasons that merely submitting the wrong form does not amount to the filing of a false tax return under § 7206(1). He relies heavily on the decisions of United States v. Reynolds, 919 F.2d 435 (7th Cir. 1990), and United States v. Borman, 992 F.2d 124 (7th Cir. 1993).

In Reynolds the defendant was convicted of a number of crimes arising out of a scheme to defraud a Milwaukee city development program funded by the U.S. Department of Housing and Urban Development. Reynolds, 919 F.2d at 436-37. He did not pay taxes on the illegally obtained funds. The defendant filed Forms 1040EZ for 1986 and 1987, accurately listing his wages, salaries, and tips as documented on his Forms W-2 and required by the 1040EZ. He also entered his taxable income on Line 7 of the 1040EZs, which was derived by arithmetic calculations based

[1] We note as a matter of public record that the instructions to the Form 1040EZ for 2009 list a number of conditions a taxpayer must meet to be permitted to use the form. The instructions limit its use to those who "had only wages, salaries, tips, taxable scholarship or fellowship grants, unemployment compensation, or Alaska Permanent Fund dividends, and ... taxable interest was not over $1,500."

on inputs from other lines on the form. However, his taxable income did not reflect the income he had obtained through his theft from the development program because the 1040EZ did not ask about it. The indictment specifically charged the defendant with filing returns that were not true and correct as to Line 7.

The court held that the defendant could not be convicted of violating § 7206(1) because he had not made any false statement in filling in the incorrect tax form. Id. at 437. As the court explained:

> [The indictment] charged that line 7, specifically, was false, and line 7 is derived arithmetically from other lines. Section 7206(1) is a perjury statute, and literal truth is a defense to perjury, even if the answer is highly misleading. Bronston v. United States, 409 U.S. 352 (1973). Using the wrong form does not violate § 7206(1). Hartford-Connecticut Trust Co. v. Eaton, 34 F.2d 128, 130 (2d Cir. 1929). If the form has an open-ended line calling for § 61 income, and the taxpayer leaves some income out, § 7206(1) applies. United States v. Young, 804 F.2d 116, 119 (8th Cir. 1986). Form 1040EZ is anything but open-ended, however.

Id. The court vacated the defendant's tax convictions with leave for the Government to file charges under different sections of the Internal Revenue Code.

The Seventh Circuit faced a similar situation once again in Borman, another case on which Fattah relies. Borman, 992 F.2d at 125-26. There two defendants filed Forms 1040A for

the years 1985 through 1987 which, like Form 1040EZ, did not inquire about business income. However, the defendants had both received business income from the manufacture and sale of seasonal wreaths. The defendants were charged under § 7206(1), and the district court dismissed the charges for failure to state an offense. Id. at 126.

Relying on Reynolds, the Seventh Circuit affirmed. Id. The court explained that under Reynolds, "the untruth must be found in a statement of some material information called for by the form itself, and any implication drawn from the filing of a particular form -- that the taxpayer had received no income requiring the use of a different form -- is simply not enough." Id. The court noted that the more appropriate charges for the filing of the incorrect form are tax evasion or failure to supply information required by law. Id. Indeed, the court explained that, to remedy the problem, "[t]he IRS need only add a single question to its Form 1040A -- e.g., 'did you receive income of any type not reported on this return?'" Id.

The Reynolds and Borman decisions are unlike the case before us. Most importantly for purposes of § 7206(1), the tax forms involved in Reynolds and Borman differ substantially from the 2009 1040EZ that Fattah submitted. The 1986 and 1987 Forms 1040EZ at issue in Reynolds, which we may consider as matters of

public record, required the taxpayer to make the following declaration:

> I have read this return. Under penalties of perjury, I declare that to the best of my knowledge and belief, the return is true, correct, and complete.

The Forms 1040A for 1985, 1986, and 1987 that were the subject of Borman require a substantially similar declaration, which states in relevant part:

> Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete.

The declarations on these forms involved in Reynolds and Borman thus can reasonably be read to restrict the taxpayer's certification to the information provided on the forms.

Significantly, the declaration Fattah signed on his 2009 Form 1040EZ in issue was much broader. It stated:

> Under penalties of perjury, I declare that I have examined this return, and to the best of my knowledge and belief, it is true, correct, and accurately lists all amounts and sources of income I received during the tax year.

(Emphasis added). Fattah, unlike the defendants in Reynolds and Borman, attested not only that his answers to the questions on the Form 1040EZ were true but also that the form contained an accurate accounting of his entire income for the year. Taking its cue from Borman, the Internal Revenue Service has extended

the reach of the declaration on the Form 1040EZ to bring the perjury alleged here within the ambit of § 7206(1). See Borman, 992 F.2d at 126. It was this broader declaration that Fattah signed in which he declared that the Form 1040EZ for the tax year 2009 "accurately lists all amounts and sources of income I received during the tax year." The indictment says he did not accurately list all his income and specifies the alleged willful falsehood.

Taking the allegations in the indictment to be true as we must at this stage, we conclude that Count Seventeen states a violation of 26 U.S.C. § 7206(1). Accordingly, Fattah's motion to dismiss Count Seventeen will be denied.